No. 00-86

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LINDA KERSTETTER, Individually, and as Personal Representative and Heir of the Estate of David Joseph Huber,

Petitioner,

v.

PACIFIC SCIENTIFIC COMPANY, BEECH AIRCRAFT CORPORATION, RAYTHEON AIRCRAFT COMPANY, BEECH AEROSPACE SERVICES, INC. and RAYTHEON AEROSPACE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS BEECH AIRCRAFT CORPORATION, RAYTHEON AIRCRAFT COMPANY, BEECH AEROSPACE SERVICES, INC. AND RAYTHEON AEROSPACE COMPANY

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QUESTION PRESENTED

Did the district court and the Fifth Circuit correctly apply the first prong of the government contractor defense to the unrebutted summary judgment evidence in this case?

STATEMENT PURSUANT TO RULE 29.6

Beech Aircraft Corporation, now known as Raytheon Aircraft Company, is a subsidiary of Raytheon Company (RTN), a publicly traded company.

Beech Aerospace Services, Inc., now known as Raytheon Aerospace Company, is also a wholly-owned subsidiary of Raytheon Company (RTN), a publicly traded company.

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STATEMENT OF THE CASE

Although Petitioner correctly sets forth the basic facts surrounding the accident from which this lawsuit arises, the evidence material to the holdings of the district court and the Fifth Circuit in this case is substantially more detailed and complex than indicated by Petitioner's Statement of the Case. While it is necessary to understand generally the accident and how it occurred, the summary judgment evidence of the aircraft's detailed design history, which began more than twenty years prior to the accident, is far more pertinent to the resolution of this petition.

The case arises from the 1995 death of Lt. David J. Huber, a United States Navy instructor pilot, following an inflight accident in a Navy T-34C trainer aircraft. Lt. Huber was inadvertently ejected through the aircraft's cockpit canopy during an attempted spin maneuver by a Navy student pilot. Lt. Huber survived the ejection, his parachute activated, and he radioed two mayday calls stating his location over the Gulf of Mexico. The next day, Lt. Huber's body was located, without his parachute, floating approximately one mile offshore. An autopsy determined that Lt. Huber died as the result of blunt force trauma injuries sustained upon his impact with the water after a high altitude fall.

The report of the Navy investigation of the accident to the offices of the Judge Advocate General described a possible cause of Lt. Huber's ejection. During pilot training exercises, the student pilot sits in the front cockpit of the T-34C aircraft, and the instructor pilot sits in the rear cockpit. Each cockpit contains a control stick and a set of rudder pedals mechanically connected to the corresponding controls in the other cockpit. Each pilot seat features a five-point

restraint system. Two shoulder restraint belts and two lap restraint belts latch into a restraint system buckle attached to a fifth restraint belt, called a "crotch strap," anchored to the pilot seat. The pilot releases the restraint system by rotating handle vanes located on the buckle's face.

A correctly positioned pilot restraint buckle cannot be contacted by the pilot's control stick. However, if a pilot's restraint buckle is incorrectly positioned, forward of the lobes of the pilot's life preserver unit, it is possible for it to be impacted by a control stick pulled to the full aft position. If Lt. Huber's restraint buckle was so positioned, it could have been contacted by his control stick during the student pilot's attempted spin entry, inadvertently releasing his restraint system. Negative g-forces caused by an overly-aggressive forward control stick input during the student pilot's attempted spin recovery could have then propelled Lt. Huber through the aircraft canopy. The Navy reached no conclusion as to why Lt. Huber came out of his parachute prematurely.

The design of the T-34C aircraft was the result of a ten-year effort by personnel from the Navy and Beech Aircraft Corporation ("Beech").[1] It began in November 1972, when the Navy published specific operational requirements for the development of a new turboprop-powered trainer airplane. Shortly thereafter, the Navy and Beech negotiated a contract for the modification and flight testing of two of the Navy's piston-powered T-34B aircraft. The preliminary model specification for this project required that the control sticks,

1. The complete design history of the T-34C aircraft is set forth in detail in the district court's opinion, with citations to the summary judgment record. *See* Petition at 34a-47a.

seat restraint systems, and cockpit geometry of the modified airplane be the same as those used in the T-34B, and also specified the exact range of allowable movement for the aircraft's control sticks. Throughout the project, government and Beech personnel worked together to draft design drawings and revisions to this preliminary model specification.

The Navy conducted a series of extensive ground and flight tests of the prototype airplanes produced under that contract. The Navy Preliminary Evaluation of the prototype was performed by a team of government pilots, engineers, and technicians at the Naval Air Test Center in Patuxent River, Maryland. During these evaluations, the Navy utilized both dynamic and static ground and flight testing to critique all of the aircraft's systems, and conducted multiple human engineering evaluations of the aircraft's cockpit and crew station design. Among discrepancies reported were complaints by Navy pilots that the straps of the aircraft's four-point pilot restraint system were difficult to adjust and provided inadequate restraint during inverted flight. Navy pilots also reported discrepancies concerning aspects of the flight control system and the spin characteristics of the modified plane.

Despite these and other reported discrepancies at this stage of the project, the Navy's Final Report of its preliminary testing concluded that the prototype exhibited excellent potential to perform the Navy's primary trainer mission. After a full operational evaluation by the Navy's Operational Test and Evaluation Force, the Navy contracted with Beech for the production of a new aircraft, called the T-34C, to be based on the design parameters established by the prototype program. Over the next several years, the Navy

and Beech entered into a series of procurement contracts for the T-34C aircraft. Each contract specified a particular version of the Navy Detail Specification for the T-34C to which such aircraft were to conform. Each successive version of the Navy Detail Specification incorporated changes to the previous version, intended to resolve aircraft design and performance discrepancies reported during Navy testing of the prototype and production models.

Under these T-34C procurement contracts, Beech had no discretion to make any change to the aircraft's design, as specified in the Navy Detail Specification, without the Navy's review and approval. After the initial T-34C procurement contract was signed, Beech engineers issued the T-34C Human Engineering Design Document. This report contained detailed descriptions and schematics of the aircraft's cockpit geometry, including a diagram showing the longitudinal distances between the control stick and other cockpit components. The report also described and illustrated a five-point pilot restraint system, with a single-action release rotary buckle, to address Navy concerns about the performance of the prototype aircraft's four-point system. In December 1975, the Navy amended its Detail Specification for the T-34C to specify use of this new pilot restraint system, the "Pacific Scientific P/N 0101979-01, Lap Belt, Shoulder harness, crotch strap, with 5-point buckle assembly and inertial reel."

The new T-34C pilot restraint system was repeatedly tested by the Navy. In September 1976, during the Navy Preliminary Evaluation of the T-34C Airplane, the Navy reported that the new five-point system kept pilots adequately secured during spin recoveries, even during inverted spins. In March 1978, during the Navy Spin Evaluation of the

T-34C, the Navy again tested the new pilot restraint system, and classified it as an "enhancing characteristic" of the aircraft, which "significantly improves airplane controllability during spins and should be included in future designs."[2] After months of additional flight testing over the next four years, during the Navy's T-34C Service Acceptance Trials, the Navy approved the human engineering characteristics and cockpit layout of the airplane, and accepted the T-34C into military service as its basic primary trainer aircraft.

The specific aircraft involved in this case was delivered to the Navy on August 31, 1983, pursuant to T-34C Navy Detail Specification SD-507-3-3-R2, signed by the Chief Engineer of the Naval Air Systems Command on December 22, 1982. Paragraph 2.13 of that specification provides, "Beech Aircraft Corporation General Assembly Drawing 104-000001 Revision A dated 7 April 1980, with changes thereto mutually agreed to by the government and the contractor, shall specifically define the configuration baseline for all Model T-34C aircraft produced under this specification." Design drawings in that general assembly drawing set, reviewed and approved by the Navy during design review sessions and product testing, depict in exacting detail the inter-cockpit control stick linkages, the shape, curvature, and construction of the control stick and control stick grip, the anchor points for the components of the pilot restraint system, and the construction of the restraint system and rotary buckle, including its handle vanes. Once approved,

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2. The Navy Spin Evaluation also included a focus on control stick positioning during spin entries and spin recoveries, for the purpose of promulgating pilot instructions on proper control inputs for those maneuvers.

no drawing could be modified without the express approval of the Navy.

During active production of the T-34C, Field Engineering Action Team ("FEAT") meetings were held, usually on an annual basis, to discuss engineering, design, and maintenance issues pertaining to the T-34C. At the 1985 FEAT meeting, the Navy informed Beech personnel for the first time of reports of "uncommanded seat harness release" in the T-34C. Navy pilots had reported that "[d]uring aerobatic maneuvers a full aft control stick deflection will sometimes contact the buckle release causing the pilot to become unrestrained in the cockpit." In 1985 and again in 1986, the Navy assigned responsibility to the Navy Training Wings to advise pilots of the problem, monitor for future occurrence, and further evaluate the severity of the problem. At no time prior to Lt. Huber's accident did the Navy either require or request that Beech take any action regarding the issue. From the time of the 1986 FEAT meeting until the time of Lt. Huber's accident, Beech heard nothing further about the inadvertent seat harness release issue.

After Lt. Huber's accident, Beech learned that the Navy had implemented special use instructions to Navy pilots, well before the accident, to address the possibility of inadvertent seat harness release in the T-34C. The Navy had instructed its pilots to position their rotary buckles underneath the lobes of their life preserver units to protect them from contact with the control stick. In fact, three years before the accident, the Navy had promulgated an interim change to its T-34C flight manual, warning pilots that improper adjustment of the pilot restraint harness could result in inadvertent release of the system.

After the accident, Lt. Huber's mother, Linda Kerstetter, brought suit against Beech Aircraft Corporation, Raytheon Aircraft Company, Beech Aerospace Services, Inc., Raytheon Aerospace Company, and Pacific Scientific Co., Inc., Respondents herein, alleging theories of strict products liability, breach of warranty, negligence and deceptive trade practices.[3] The district court granted summary judgment for Respondents on all claims asserted by Petitioner. Petitioner's design defect claims, the only claims at issue in this petition, were held precluded by the government contractor defense. The district court's judgment was subsequently affirmed by the United States Court of Appeals for the Fifth Circuit.

REASONS FOR DENYING THE WRIT

In *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512, 108 S. Ct. 2510, 2518, 101 L. Ed. 2d 442 (1988), this Court held as follows:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise

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3. For all purposes material to this litigation, Beech Aircraft Corporation is now known as Raytheon Aircraft Company. Beech was the manufacturer of the T-34C aircraft at issue. Similarly, Beech Aerospace Services, Inc., ("BASI") is now known as Raytheon Aerospace Company. BASI was the Navy maintenance contractor for the T-34C aircraft. Since all four of Petitioner's "questions presented" pertain only to her design defect claims, which do not pertain to BASI, the instant petition for writ of certiorari does not challenge the district court's entry of summary judgment for BASI, nor the Fifth Circuit's affirmance thereof. Pacific Scientific Co., Inc., represented by separate counsel, was the manufacturer of the T-34C pilot seat restraint system.

> specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Although attempting to justify her petition for writ of certiorari in terms of misapplication of the legal standard in *Boyle* and asserted conflicts of law among the circuits, Petitioner is in substance seeking yet another *de novo* review of the unrebutted summary judgment evidence in this case. Each of the questions presented, as posed by Petitioner, misrepresents either the nature of the summary judgment evidence itself, or the holdings of the courts below with respect to that evidence. This case is not one that requires or justifies this Court's exercise of its extraordinary and discretionary jurisdiction.

As formulated by Petitioner, there are three questions that affect Beech.[4] All involve the application of the facts in this case to the first prong of the government contractor defense, *i.e.*, whether "the United States approved reasonably precise specifications." In essence, Petitioner asks a single question: Did the courts below correctly apply the first prong of the government contractor defense to the unrebutted summary judgment evidence in this case? The answer is plainly yes.

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4. Petitioner's fourth question, concerning the availability of the government contractor defense to subcontractors, pertains only to Respondent Pacific Scientific Co., Inc., and therefore is not addressed herein.

THE PETITION SHOULD BE DENIED BECAUSE THE LOWER COURTS PROPERLY APPLIED THE *BOYLE* STANDARD.

Both the district court and the Fifth Circuit quoted at length from the *Boyle* opinion and precisely set forth the three elements of the government contractor defense as formulated by this Court. *See* Petition at 5a-6a, 24a-26a. The district court carefully applied the facts of this case to each of those elements through a detailed review of the complex design history of the T-34C aircraft, ensuring that the design features in question — including the control stick, the pilot restraint system buckle, and the cockpit geometry of the aircraft — were "considered by [the Navy], and not merely by [Beech] itself." *See Boyle*, 487 U.S. at 512, 108 S. Ct. at 2158. The Fifth Circuit, reviewing the summary judgment record *de novo*, found the district court's conclusion appropriate. *See* Petition at 12a. There is no conflict between this Court's statement of the government contractor defense in *Boyle* and the lower courts' application of *Boyle* in this case.

I. Petitioner's First Question Misstates the Holdings of the Lower Courts.

The first question posed by Petitioner derives from the premise that in applying the first prong of *Boyle*, the lower courts did not accept Petitioner's determination of the "design feature in issue." *See* Petition at 6. This premise is not accurate. Petitioner asserts that the design features at issue are "the safety harness buckle's raised vertical vanes, the curvature of the control stick, and the shape of the stick handle." *Id.* The district court held that the unrebutted summary judgment evidence conclusively established that

the government approved reasonably precise specifications for the design features at issue. *See id.* at 50a. In detailing page after page of summary judgment evidence that supported this determination, the district court specifically described the design features at issue as "the shape and location of the control stick, the spatial arrangement of the cockpit, and the unguarded vertical vanes on the rotary buckle of the pilot restraint system." *Id.* at 52a. The Fifth Circuit, reviewing the evidence *de novo*, found that the district court's conclusion "was appropriate under the facts of this case." *Id.* at 12a. There is no justification for this Court to exercise jurisdiction to give Petitioner yet another chance to argue the same facts analyzed by the lower courts.

II. Petitioner's Second Question Misconstrues Both the Holdings of the Lower Courts and the Government Contractor Defense Standard.

The second question posed by Petitioner is premised on her assertion that she presented evidence that the manufacturers could have utilized a safer alternative design for the features in issue without violating federal design specifications. *See* Petition at 11. Simultaneously, this question factually misconstrues the holdings in this case of the courts below and legally misconstrues the government contractor defense standard as set forth in *Boyle* and applied in the circuit courts.

A. Precise Specifications Approved by the Government Preclude Liability for Failure to Use an Alternative Design.

As the district court held, and as the Fifth Circuit affirmed, the unrebutted summary judgment evidence

established that the aircraft at issue was manufactured pursuant to Navy Detail Specification SD-507-3-3-R2, issued by the Navy on December 22, 1982. That Navy specification document required manufacture of the aircraft in accordance with the T-34C general assembly set of engineering drawings, which themselves had been reviewed and approved by Navy engineers. *See* Petition at 44a-45a. Those drawings describe, by part number and appearance, all of the features about which Petitioner complains. Therefore, the unrebutted summary judgment evidence establishes that Beech had a contractual duty to manufacture the T-34C aircraft at issue with a restraint system buckle with raised vertical vanes, and with a control stick and control stick handle shaped and curved in accordance with the engineering drawings for those components. That duty is expressly contrary to the state-imposed duty of care that Petitioner asserts as a basis for liability — the duty to equip the aircraft with a restraint buckle, control stick, and control stick grip with different, "safer" designs.[5] *Boyle* precludes liability in such circumstances. *See* 487 U.S. at 509, 108 S. Ct. at 2517.

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5. This case is thus factually distinguishable from the air conditioner example in *Boyle* relied on by Petitioner. *See* Petition at 14. In that example, the Court stated that the government contractor defense would not apply in a situation in which the government approved performance specifications (air conditioner cooling capacity) but not the manner in which the air conditioner was constructed. In this case, the government approved precise specifications detailing the appearance, configuration, and manner of assembly for each component at issue. For that same reason, the air conditioner example in *Boyle* is distinguishable from the air conditioner fan at issue in *Stout v. Borg-Warner Corp.*, 933 F.2d 331, 334-36 (5th Cir.), *cert. denied*, 502 U.S. 981, 112 S. Ct. 584, 116 L. Ed. 2d 609 (1991), since the government approved precise specifications for the configuration and manner of construction of the fan, through Army design reviews and testing of the unit.

B. Petitioner Misconstrues the *Boyle* Standard.

Petitioner's argument concerning her second question presented misconstrues in multiple ways the standard set forth in *Boyle*. Petitioner claims that *Boyle* limits the government contractor defense to cases in which the "tortfeasor demonstrates that the *government* consciously and prospectively specified that the design feature in issue be the way that it was." Petition at 13 (emphasis added). First, nothing in *Boyle* requires that the specifications approved be "government specifications" or "federal specifications." Rather, the first prong of the *Boyle* standard provides that the defense applies when the government *approves* reasonably precise specifications, regardless of who creates them. *See* 487 U.S. at 512, 108 S. Ct. at 2518. As this Court stated in rejecting an alternative formulation of the government contractor defense, "The design ultimately selected may well reflect a significant policy judgment by Government officials whether or not the contractor rather than those officials developed the design." *Id.* at 513, 108 S. Ct. at 2519.

Second, nothing in *Boyle* restricts the scope of relevant specifications to "prospective" specifications, or specifications in existence at the time that the components at issue were originally designed. Yet Petitioner repeatedly asserts that the components at issue "were not designed with regard to any government specifications," citing to testimony concerning the *original* design of those components, as if that time frame were even relevant in this case. *See* Petition at 8, 9, 11, 15. The district court's opinion pinpoints the flaws in Petitioner's reasoning:

> The proper focus must be on whether the government *approved* specifications (created by its engineers or the contractors' engineers) that did not contain the safer design. It may be true that no government specifications existed at the time Pacific Scientific designed its buckle or Beech chose to use that buckle that would have prevented the inclusion of a buckle guard or the elimination of the vertical vanes. It is true, however, that reasonably precise specifications came into existence when Beech chose to use that buckle. When the government approved that choice through its design process and extensive testing of the aircraft, the first element of the government contractor defense was satisfied.

Id. at 56a.

Finally, Petitioner proposes a definition of the term "design *feature* in issue" that essentially equates that term with the design *hazard* or design *defect* that a plaintiff alleges. *See* Petition at 6-10. Thus, when Petitioner proposes a standard requiring the government to "consciously" specify the "design feature in issue," *see id.* at 13, she, in effect, proposes a requirement that the government approve the *risks* and *dangers* associated with the design, in addition to approving the design itself. The Court in *Boyle* rejected a standard of just that sort, that would have required that the government be forewarned of all risks of the design, and yet authorize the contractor to proceed with the dangerous design anyway. *See* 487 U.S. at 513, 108 S. Ct. at 2519. As this Court stated, "[I]t does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it

identifies all design defects." *Id.* The rejection of Petitioner's proposed standard by both the district court and the Fifth Circuit in this case was fully consistent with *Boyle*.

C. The Circuit Courts Are in Agreement on the *Boyle* Standard.

Nor is there a circuit split on the applicable standard. Petitioner quotes dicta in *Gray v. Lockheed Aeronautical Sys. Co.*, 125 F.3d 1371, 1377 (11th Cir. 1997), *vacated*, 524 U.S. 924, 118 S. Ct. 2317, 141 L. Ed. 2d 692 (1998), stating that the defense applies only when the contractor demonstrates that "the government made me do it," for the proposition that the Eleventh Circuit adheres to a different standard for application of the defense than that applied by the Fifth Circuit in this case. *See* Petition at 13. However, close examination of that case reveals that nothing in *Gray*, including the dicta quoted, purports to announce any standard that differs in any way from that applied by any other circuit court of appeals. In fact, in applying the three elements of the government contractor defense set forth in *Boyle*, the Eleventh Circuit in *Gray* cited favorably to two opinions from the Fifth Circuit and two others from the Fourth and Seventh Circuits. *See id.* at 1377-79 (citing, *inter alia*, *In re Air Disaster at Ramstein Air Base, Germany*, 81 F.3d 570 (5th Cir.), *cert. denied*, 519 U.S. 1028, 117 S. Ct. 583, 136 L. Ed. 2d 513 (1996), and *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir.), *cert. denied*, 493 U.S. 935, 110 S. Ct. 327, 107 L. Ed. 2d 317 (1989)).

Further, in applying the first prong of the government contractor defense, the Eleventh Circuit in *Gray* cited to prior Eleventh Circuit case law applying *Boyle* for the proposition that "government approval" may be established by proof that

the government approved specifications *prepared by the contractor*. *See id.* at 1377 (quoting *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311 (11th Cir. 1989), *cert. denied*, 494 U.S. 1030, 110 S. Ct. 1479, 108 L. Ed. 2d 615 (1990)). The Eleventh Circuit's opinion in *Gray* is thus expressly contrary to Petitioner's interpretation of it. In fact, the Eleventh Circuit's statement and application of the government contractor defense standard is fully consistent with the Fifth Circuit's statement and application of the defense in this case. The result in *Gray* differs from the result here not because of any differing legal standards, but rather because of differing facts. Not surprisingly, the *Gray* court held the government contractor defense inapplicable to the facts before it, where defendant Lockheed failed to come forward with *any* engineering drawings or other detailed quantitative specifications for the aileron servo at issue in that case. *See* 125 F.3d at 1378.

The Second Circuit's opinion in *In re Joint Eastern and Southern Dist. of N.Y. Asbestos Litigation*, 897 F.2d 626, 632 (2d Cir. 1990), was the source of the "government made me do it" language quoted in *Gray*. Apparently based on that quotation alone, Petitioner contends that the Second Circuit adheres to a different formulation of the government contractor defense than that applied by other circuit courts. *See* Petition at 13. To start with, *In re Asbestos* is both legally and factually inapposite to the case at bar. The plaintiffs in that case claimed that the defendants *failed to warn* of the hazards of asbestos in cement used at a Navy shipyard. [6] Defendant Eagle-Picher argued that those claims should be

6. None of Petitioner's four "questions presented" challenge the Fifth Circuit's affirmance of the district court's entry of summary judgment on her failure to warn claims.

barred by the government contractor defense because the Navy had approved *design specifications* for the cement. *See* 897 F.2d at 630-32. In rejecting that argument, the Second Circuit stated that although Eagle-Picher's contract with the Navy covered the contents of the cement, the contract did not cover warnings. *Id.* at 632. The *In re Asbestos* case did not involve a design defect claim at all, much less purport to announce a standard for applying the government contractor defense to design defect claims in a manner different from its application in other circuits.

Finally, as Petitioner is well aware, *In re Asbestos* is not the only Second Circuit case addressing the government contractor defense. In *Lewis v. Babcock Indus., Inc.*, 985 F.2d 83 (2d Cir.), *cert. denied*, 509 U.S. 924, 113 S. Ct. 3041, 125 L. Ed. 2d 727 (1993), the Second Circuit applied the defense in a design defect case in a manner fully consistent with the Fifth Circuit's application of *Boyle* in the case at bar. Far from requiring that the government "consciously and prospectively" dictate the design at issue, *see* Petition at 13, the *Lewis* court held that the government contractor defense was established based on the Air Force's decision to reorder aircraft ejection system parachute cables, originally designed and manufactured by a component subcontractor, after learning of those cables' tendency to corrode. *See* 985 F.2d at 89. The case law lends no support to Petitioner's contention that the Second Circuit or Eleventh Circuit interprets the government contractor defense in a manner inconsistent with the Fifth Circuit's application of the defense in this case (or in a manner inconsistent with the Third and Sixth Circuits). Petitioner's alleged "circuit split" is illusory.

III. Petitioner's Third Question Misrepresents the Lower Courts' Holdings.

Petitioner's third question presented, regarding post-procurement government conduct, *see* Petition at 15-20, requires only a brief response. First, Petitioner misrepresents the Fifth Circuit's opinion in this case when she states, "[T]he Fifth Circuit . . . held that post-procurement activities are dispositive of the government contractor defense." *Id.* at 15. Neither the Fifth Circuit nor the district court held that evidence of post-procurement government conduct in this case was "dispositive." Both the Fifth Circuit and the district court noted that the government's continued use of a product after procurement, with actual knowledge of its design propensities, *may* provide an independent basis for satisfying the government contractor defense's first prong. *See id.* at 12a, 51a, 53a. However, neither court decided that issue. Both the district court and the Fifth Circuit found that the summary judgment record, as a whole, established that the government approved reasonably precise specifications for the design features in question at the time of procurement, citing the Navy's participation in the development of the prototype aircraft, the Navy's design review of T-34C engineering drawings, the Navy's extensive series of ground and flight tests of the prototype and production aircraft (including its control stick, pilot restraint system, and cockpit layout), and the precise specifications set forth in the T-34C procurement contract documents. *See id.* at 10a-12a, 50a-57a.

Nonetheless, even if the Fifth Circuit had relied solely on the government's treatment of the "uncommanded seat harness release" issue following the 1985 and 1986 FEAT meetings in holding the first prong of the government

contractor defense established, such an analysis would have been consistent with that of every other circuit court to address the issue. *See Lewis*, 985 F.2d at 89; *Ramey v. Martin-Baker Aircraft Co., Ltd.*, 874 F.2d 946, 951 n.9 (4th Cir. 1989); *Dowd v. Textron, Inc.*, 792 F.2d 409, 412 (4th Cir. 1986), *cert. denied*, 487 U.S. 1233, 108 S. Ct. 2897, 101 L. Ed. 2d 930 (1988). Certainly, evidence of a governmental decision — when confronted with the very design defect that plaintiff alleges — to address the problem through pilot instructions, rather than through a design change, is consistent with *Boyle*'s recognition that "[t]he design ultimately selected may well reflect a significant policy judgment by Government officials whether or not the contractor rather than those officials developed the design." 487 U.S. at 513, 108 S. Ct. at 2519.

CONCLUSION

Both the district court and the Fifth Circuit correctly stated and applied the government contractor defense standard set forth in *Boyle*. Furthermore, the result is consistent with the policy rationale underlying the defense. There is no conflict between the lower courts' holdings in this case and this Court's opinion in *Boyle*. Nor is there a conflict among the circuit courts of appeal on any issue raised by Petitioner. In substance, Petitioner's complaint is not with the correctness of the legal standards applied, but rather with the result that those legal standards require in this case. There being no basis in law or in fact for further review of this case, Beech respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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